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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VIRGINIA K. DEMARCHI

M.K., A MINOR BY AND THROUGH)
HIS GUARDIAN AD LITEMS BRIAN AND)
MELANIE KIRKSEY,)
)
PLAINTIFF,)
)
VS.) CASE NO. 21-CV-08465
)
GOOGLE, LLC AND FREMONT UNIFIED)
SCHOOL DISTRICT,)
) SAN JOSE, CALIFORNIA
DEFENDANTS.) TUESDAY, JUNE 14, 2022
)
)
)

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 10:43 A.M. - 11:18 A.M.

APPEARANCES:

FOR PLAINTIFF LAW OFFICE OF NICOLE HODGE AMEY
8033 MAC ARTHUR BOULEVARD, SUITE 5100
OAKLAND, CALIFORNIA 94605
BY: **NICOLE HODGE AMEY, ESQUIRE**

FOR DEFENDANT LEONE ALBERTS & DUUS, APC
FREMONT USD 1390 WILLOW PASS ROAD, SUITE 700
CONCORD, CALIFORNIA 94520
BY: **BRIAN DUUS, ESQUIRE**

FOR DEFENDANT PERKINS COIE LLP
GOOGLE 505 HOWARD STREET, SUITE 1000
SAN FRANCISCO, CALIFORNIA 94105
BY: SAMUEL WILSON, ESQUIRE

TRANSCRIBED BY: JOAN MARIE COLUMBINI

1 TUESDAY, JUNE 14, 2022

10:43 A.M.

2
3 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSEL'S FAILURE TO
4 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER
5 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

6 ---000---

7 ELECTRONICALLY RECORDED PROCEEDINGS

8 **THE CLERK:** CALLING CASE 21-8465, M.K. VERSUS GOOGLE,
9 LLC, ET AL., ON FOR THE FREMONT UNIFIED SCHOOL DISTRICT'S
10 MOTION TO DISMISS.

11 COUNSEL, STATE YOUR APPEARANCES FOR THE RECORD,
12 BEGINNING WITH PLAINTIFF.

13 **MS. AMEY:** GOOD MORNING, YOUR HONOR. NICOLE AMEY,
14 ATTORNEY FOR M.K.

15 **THE COURT:** GOOD MORNING.

16 **MR. DUUS:** GOOD MORNING, YOUR HONOR. BRIAN DUUS ON
17 BEHALF OF THE FREMONT UNIFIED SCHOOL DISTRICT.

18 **THE COURT:** OKAY. GOOD MORNING.

19 **MR. DUUS:** I ALSO HAVE MY DAUGHTER AND --

20 **THE COURT:** OKAY. GREAT. I ASSUME SHE WILL NOT BE
21 ARGUING.

22 **UNIDENTIFIED SPEAKER:** (INDISCERNIBLE.)

23 **THE COURT:** OKAY.

24 **MR. DUUS:** NOT THIS CASE, YOUR HONOR.

25 **MR. WILSON:** SAM WILSON, OF PERKINS COIE FOR

1 DEFENDANT, GOOGLE.

2 **THE COURT:** THANK YOU. ALL RIGHT.

3 SO THIS IS THE DISTRICT'S MOTION TO DISMISS THE
4 CLAIMS AGAINST THE DISTRICT UNDER RULE 12(B) (6), AND LET ME
5 JUST START BY CONFIRMING THAT I UNDERSTAND THAT THE PLAINTIFF
6 SAYS THAT THEY ARE NOT, AND NEVER WERE, PURSUING CLAIM 1 OR
7 CLAIM 3 AGAINST THE DISTRICT. IS THAT A FAIR CHARACTERIZATION,
8 MS. AMEY? I'M CONFIRMING.

9 CLAIM 1 IS --

10 **MS. AMEY:** YES, TO CLAIM 1.

11 **THE COURT:** OKAY.

12 **MS. AMEY:** AND YES FOR CLAIM 3. (INDISCERNIBLE.)

13 **THE COURT:** OKAY. ALL RIGHT. I JUST WANTED TO MAKE
14 SURE THAT I HAVE THAT CLEAR. IT WAS NOT VERY CLEAR FROM
15 READING THE COMPLAINT AGAINST WHICH DEFENDANT EACH CLAIM WAS
16 ASSERTED.

17 SO I DO HAVE SOME VERY PARTICULAR QUESTIONS. I WILL
18 START WITH QUESTIONS FOR THE SCHOOL DISTRICT.

19 SO I'M INTERESTED IN CLAIM 2. AND LET ME JUST START
20 WITH ASKING WHAT IT MEANS TO BE AN OPERATOR OF AN ONLINE
21 SERVICE APPLICATION OR WEBSITE? TELLING ME IT GOES WITHOUT
22 SAYING IS NOT VERY HELPFUL, AS I DON'T HAVE ANY CASE LAW ON
23 THAT, AND THE STATUTE ITSELF IS NOT VERY HELPFUL. IT'S NOT
24 REALLY MEANINGFULLY DEFINED. IT'S CIRCULARLY DEFINED. "AN
25 OPERATOR IS AN OPERATOR." SO HOW WOULD YOU HELP ME UNDERSTAND

1 WHAT AN OPERATOR OF AN ONLINE SERVICE OR APPLICATION OR WEBSITE
2 IS?

3 **MR. DUUS:** YOUR HONOR, I'M CERTAINLY GOING TO DO
4 THAT, YOUR HONOR. I WOULD ALSO LIKE TO RAISE AT THIS TIME
5 (INDISCERNIBLE) IN OUR PAPERS, BUT GOOGLE, LLC, HAS ALSO RAISED
6 A PREEMPTION ARGUMENT.

7 **THE COURT:** YEP. I SAW THAT. LET ME GET AN ANSWER
8 TO MY QUESTION FIRST.

9 **MR. DUUS:** YOUR HONOR, I THINK WHEN YOU'RE LOOKING
10 AT -- I UNDERSTAND WHAT YOU'RE SAYING ABOUT THE DEFINITION IS
11 CIRCULAR.

12 **THE COURT:** YEP.

13 **MR. DUUS:** I WANT TO POINT OUT FIRST THAT IN THE
14 COMPLAINT, THE DISTRICT IS NOT ALLEGED TO BE AN OPERATOR.

15 **THE COURT:** OKAY.

16 **MR. DUUS:** SO THAT I THINK THAT WOULD BE A NECESSARY
17 ALLEGATION, FIRST AND FOREMOST.

18 IF YOU LOOK AT THE COMPLAINT AT PARAGRAPH 30, GOOGLE
19 IS SPECIFICALLY ALLEGED TO BE AN OPERATOR. THE DISTRICT IS
20 NOT.

21 **THE COURT:** AND IF WE LOOK AT CLAIM 2 ITSELF, THEY
22 ALL SEEM DIRECTED TO GOOGLE. ALL THE ALLEGATIONS SEEM TO BE
23 DIRECTED TO GOOGLE. OKAY. SO I TAKE THAT POINT.

24 NEVERTHELESS, WHAT'S AN OPERATOR?

25 **MR. DUUS:** OKAY. WELL, I THINK THE OPERATOR IS --

1 THE STATUTE, WHEN YOU'RE LOOKING AT THE STATUTE ITSELF, FOR
2 PURPOSE OF THE STATUTE, OPERATOR MEANS THE OPERATOR. THAT'S
3 NOT HELPFUL. I GET THAT. INTERNET WEBSITE, ONLINE SERVICE,
4 ONLINE APPLICATION, OR MOBILE APPLICATION. THE FACTUAL
5 KNOWLEDGE THAT (INDISCERNIBLE) APPLICATION IS USED PRIMARILY
6 FOR K-12 SCHOOL PURPOSES AND WAS DESIGNED AND MARKETED FOR K-12
7 SCHOOL PURPOSES.

8 SO I THINK AT LEAST THE LAST PART OF THAT STATUTE
9 MAKES IT CLEAR THAT THIS IS REFERRING TO COMMERCIAL
10 APPLICATIONS OF A WEBSITE OR A SERVICE. I MEAN, THE DISTRICT
11 CERTAINLY DID NOT DESIGN AND MARKET GOOGLE CLASSROOM. THAT'S
12 GOOGLE'S ROLE.

13 SO I THINK WHEN YOU'RE LOOKING AT THIS WHOLE OF THE
14 STATUTE, THE TOTALITY OF THE STATUTE, CERTAINLY THE LANGUAGE OF
15 THE STATUTE INDICATES THAT THIS ISN'T SOMEBODY WHO'S JUST USING
16 THE APPLICATION, RIGHT? AND THAT'S REALLY ALL THE DISTRICT IS
17 DOING. THEY COULD HAVE GONE ANOTHER KIND OF APPLICATION. THEY
18 COULD HAVE GONE A DIFFERENT ROUTE, BUT THEY'RE ESSENTIALLY A
19 USER, IN SOME SENSE THE SAME AS THE STUDENT IS.

20 **THE COURT:** RIGHT.

21 **MR. DUUS:** RIGHT? THEY'RE NOT DESIGNING OR MARKETING
22 IT.

23 **THE COURT:** YEAH.

24 **MR. DUUS:** SO THAT'S WHERE I THINK THE STATUTE IS
25 (INDISCERNIBLE) NECESSARY. OKAY. WE'RE LOOKING AT THE

1 DESIGNERS, THE MARKETERS, THE PEOPLE WHO HAVE CONTROL WHO
2 OPERATE WHAT THE APPLICATION IS.

3 I MEAN, THE DISTRICT CAN CERTAINLY USE IT. THEY CAN
4 STICK FEATURES ON IT, CERTAINLY ASPECTS OF IT THEY MAY WANT OR
5 NOT WANT, BUT THE PRODUCT ITSELF WAS NOT DESIGNED, MARKETED, OR
6 OPERATED BY THEM.

7 (SIMULTANEOUS COLLOQUY.)

8 **THE COURT:** JUST A MOMENT. YOUR ARGUMENT MAKES
9 INTUITIVE SENSE, OF COURSE THAT THE SCHOOL DISTRICT IS A USER,
10 NOT THE SAME KIND OF USER AS THE STUDENTS, BUT IS A USER IN
11 THAT SENSE. HOWEVER, I THINK THE STATUTORY LANGUAGE THAT
12 YOU'RE POINTING ME TO ISN'T SUPER HELPFUL, BECAUSE PART OF THE
13 DEFINITION OF "OPERATOR" THAT REFERS TO "AND WAS DESIGNED AND
14 MARKETED FOR K-12 SCHOOL PURPOSES" MODIFIES THE PHRASE "WITH
15 ACTUAL KNOWLEDGE THAT..."

16 SO ALL IT WOULD REQUIRE, PRESUMABLY, IS THAT THE
17 OPERATOR, OR WHOEVER IT MAY BE, LET'S SAY THE SCHOOL DISTRICT,
18 WHICH IS PLAINTIFF'S THEORY, HAD ACTUAL KNOWLEDGE THAT IT WAS
19 USED PRIMARILY FOR SCHOOL PURPOSES AND WAS DESIGNED AND
20 MARKETED FOR SCHOOL PURPOSES, NOT THAT THE SCHOOL DISTRICT WAS
21 THE DESIGNER OR THE MARKETER. THAT'S HOW I READ THAT TEXT
22 ANYWAY. SO AGAIN, YOU KNOW, I THINK THE LANGUAGE IN THE
23 STATUTE IS NOT PARTICULARLY HELPFUL TO EITHER OF US ON THAT
24 POINT.

25 **MR. DUUS:** I WOULD ALSO SAY THE STARTING POINT FOR

1 INTERPRETING THE STATUTE IS WHAT MAKES SENSE. I MEAN YOU DON'T
2 WANT TO READ INTO --

3 **THE COURT:** YOU MIGHT THINK.

4 **MR. DUUS:** -- AN ABSURDITY. AND I WOULD ASK THE
5 COURT TO SAY, OKAY, IF WE ARE GOING TO APPLY THE STATUTE AS AN
6 OPERATOR TO SCHOOL DISTRICTS, THEY'RE USING ALL KINDS OF
7 SOFTWARE AND OTHER APPLICATIONS, AND IT MIGHT FALL WITHIN THE
8 PURVIEW OF THE STATUTE. IS THAT GOING TO PUT A BURDEN ON THEM,
9 BECAUSE WASN'T IT INTENDED BY THE STATUTE. (INDISCERNIBLE) OUR
10 ARGUMENT FROM THE OTHER SIDE POINTING THAT THIS STATUTORY
11 LANGUAGE WAS NEVER INTENDED TO APPLY TO A PUBLIC ENTITY SUCH AS
12 A SCHOOL DISTRICT.

13 IT'S JUST TAKING A PRODUCT THAT IN THE REALM OF A
14 MUCH MORE SOPHISTICATED VENDOR, SUCH AS GOOGLE OR ANOTHER
15 VENDOR, PUTTING THAT BURDEN ON THE SCHOOL DISTRICT, THAT'S NOT
16 CONTEMPLATED IN THE LANGUAGE OF THE STATUTE. IF IT'S
17 (INDISCERNIBLE) I WOULD ARGUE THAT THE FUNDAMENTAL RULE OF
18 STATUTORY CONSTRUCTION WEIGHS IN THE SCHOOL DISTRICT'S FAVOR.

19 **THE COURT:** IS THERE ANY USEFUL LEGISLATIVE HISTORY
20 ON THIS PROVISION?

21 **MR. DUUS:** I DON'T KNOW AS I STAND HERE TODAY, YOUR
22 HONOR.

23 **THE COURT:** OKAY. JUST WONDERING.

24 ALL RIGHT. NOW I'D LIKE TO HEAR YOUR PREEMPTION
25 ARGUMENT, BECAUSE I DID -- BOTH PARTIES -- I DID SEE THE MOTION

1 THAT WAS FILED BY GOOGLE, WHICH IS NOT BEFORE ME RIGHT NOW IN
2 THIS HEARING, BUT I DID SEE IT, AND I DID SEE THE PREEMPTION
3 ARGUMENT THAT'S MADE, AND I WOULD LIKE TO HEAR, THOUGH IT'S NOT
4 PART OF YOUR -- YOUR BRIEFING ON BEHALF THE SCHOOL DISTRICT, I
5 WOULD LIKE TO HEAR WHAT YOU HAVE TO SAY ABOUT THAT.

6 **MR. DUUS:** YOUR HONOR, ADMITTEDLY, THAT WAS AN
7 OVERSIGHT ON OUR PART. IT SHOULD HAVE BEEN -- I THINK IT'S A
8 JURISDICTIONAL ARGUMENT AND (INDISCERNIBLE) AND RAISE IT AT ANY
9 TIME.

10 BUT THE CASE LAW CITED BY GOOGLE IN THEIR FAVOR AND
11 THE STATUTE ITSELF MAKE CLEAR THE CHILD ONLINE PRIVACY
12 PROTECTION ACT, COPPA, WAS INTENDED TO CONNECT STATE LAW
13 THAT -- EITHER CONFLICTING WITH IT OR WAS SUBSUMED BY IT. I
14 MEAN, THAT MAKES SENSE WHEN YOU THINK ABOUT COPPA APPLYING TO
15 THE ENTIRE NATION, AND SOPIPA, OF COURSE, ONLY BEING A
16 CALIFORNIA-SPECIFIC STATUTE.

17 SO THE IMPORTANT PART OF THAT IS THAT COPPA, BY ITS
18 OWN TERMS, ONLY APPLIES TO BUSINESSES, WHICH PLAINLY THE SCHOOL
19 DISTRICT IS NOT. I'M SORRY -- COPPA ALLOWS FOR VIOLATION OF IT
20 ONLY BY THOSE ENGAGED IN BUSINESS-TYPE ACTIVITY.

21 SO THE SCHOOL DISTRICT -- THERE IS NO ALLEGATION THAT
22 THE SCHOOL DISTRICT WAS ENGAGED IN ANY COMMERCIAL ACTIVITIES
23 ASSUMING, AS WE BELIEVE, THAT COPPA PREEMPTION APPLIES, THAT
24 WOULD NEGATE THE SOPIPA CLAIM, THE FAILURE TO PROTECT CLAIM,
25 AND THE PRIVACY CLAIM, BECAUSE THEY ALL ARISE FROM THE SAME

1 NUCLEUS.

2 **THE COURT:** SO LET ME PAUSE YOU THERE.

3 I THINK THE WAY THIS WOULD WORK IS IF -- WELL, THE
4 WAY PREEMPTION WOULDN'T WORK IS IF SOPIPA WERE CONSTRUED TO
5 APPLY TO SOMEONE IN THE SCHOOL DISTRICT, I.E., NOT A BUSINESS,
6 BUT SOMEONE WHO HAS PURCHASED OR TAKEN -- NOT PURCHASED IN THIS
7 SITUATION BECAUSE IT'S FREE, BUT IT HAS ADOPTED THIS SOFTWARE
8 APPLICATION AS THE VEHICLE BY WHICH TO CONDUCT CLASSROOM
9 INSTRUCTION REMOTELY, AND IS THEREBY AN OPERATOR OF THAT
10 APPLICATION, TAKING IT OUT OF THE DOMAIN OF COPPA, WHICH WOULD
11 NOT APPLY, WOULD IT -- WOULD THE PREEMPTION ARGUMENT THEN BREAK
12 DOWN, IN OTHER WORDS, SO COPPA WOULD NOT BE PREEMPTIVE OF
13 SOPIPA IN THAT SITUATION?

14 **MR. DUUS:** I HAVE TO CONFESS, YOUR HONOR. COULD YOU
15 REPEAT THE QUESTION?

16 **THE COURT:** IT'S A LITTLE BIT COMPLICATED. I THINK
17 THE PREMISE OF YOUR PREEMPTION ARGUMENT IS COPPA APPLIES TO
18 BUSINESSES.

19 (SIMULTANEOUS COLLOQUY.)

20 **MR. DUUS:** COPPA APPLIES TO BUSINESSES. COPPA
21 CERTAINLY APPLIES TO THE CONDUCT ALLEGED HERE WOULD BE VIOLATED
22 BY A BUSINESS, WHICH THE DISTRICT IS NOT.

23 **THE COURT:** IT MAY NOT BE A -- SO WHAT I'M TRYING TO
24 SAY IS THAT'S IF I ADOPT YOUR THESIS ABOUT WHAT SOPIPA COVERS,
25 WHO AN OPERATOR IS. YOU'RE SAYING THE SCHOOL DISTRICT CAN'T BE

1 AN OPERATOR UNDER THE STATUTE. IF YOU'RE WRONG ABOUT THAT AND
2 THE SCHOOL DISTRICT COULD BE AN OPERATOR UNDER THE STATUTE,
3 SOPIPA, THEN WHY WOULD THERE BE PREEMPTION BY COPPA?

4 **MR. DUUS:** BECAUSE THE KIND OF PRODUCT THAT'S ALLEGED
5 WITHIN THE COMPLAINT FALLS WITHIN THE AMBIT OF COPPA.

6 **THE COURT:** OKAY. WOULD YOU CARE TO ELABORATE?

7 **MR. DUUS:** YEAH, I MEAN I'M READING -- THESE ARE NOT
8 MY CLEVER ARGUMENTS. I'M READING FROM GOOGLE'S PAPERS:

9 "THE CLAIMS THAT ARISE FROM THE
10 ALLEGED CONDUCT, THE UNCONSENTED ONLINE
11 COLLECTION OF DATA FROM A CHILD IS
12 EXCLUSIVELY GOVERNED BY COPPA."

13 SO AT ISSUE HERE IS PLAINTIFFS SAYING, OKAY, YOU
14 UNAUTHORIZEDLY COLLECTED PERSONAL INFORMATION ABOUT ME -- AND,
15 YOU KNOW, ONE THING I HAVE TO EMPHASIZE, FOR PLAINTIFF'S
16 FAILURE TO -- FAILURE TO PROTECT AND THE PRIVACY ARGUMENT, THEY
17 RELY ON COPPA AS THE AUTHORIZING STATUTE. REMEMBER, IN
18 CALIFORNIA, OF COURSE, A PUBLIC ENTITY, YOU NEED AN AUTHORIZING
19 STATUTE. THE ONLY ONE THEY SITE TO IS COPPA.

20 SO WHAT DOES COPPA PROHIBIT? IT PROHIBITS THE
21 UNAUTHORIZED COLLECTION OF INFORMATION ABOUT A CHILD WHO'S
22 ONLINE. SO THAT IS THE REASON I DON'T THINK THE PREEMPTION
23 ARGUMENT BREAKS DOWN.

24 **THE COURT:** OKAY.

25 **MR. DUUS:** EVEN ASSUMING THE DISTRICT IS AN OPERATOR.

1 **THE COURT:** OKAY. GOT IT. ALL RIGHT. THOSE ARE THE
2 PRINCIPAL QUESTIONS I HAD FOR YOU BASED ON THE BRIEFING, WHICH
3 I OTHERWISE FOUND RELATIVELY STRAIGHTFORWARD FROM THE SCHOOL
4 DISTRICT. IS THERE ANYTHING YOU WOULD LIKE TO ARGUE FURTHER
5 THAT YOU WOULD LIKE TO PARTICULARLY CALL MY ALLEGATION TO?

6 **MR. DUUS:** I ALSO WANT TO ADOPT THE ARGUMENT RAISED
7 IN GOOGLE'S PAPERS THAT THERE ISN'T A PRIVATE RIGHT OF ACTION
8 UNDER SOPIPA.

9 **THE COURT:** ALL RIGHT. WELL, PREVIEWING THAT, THE
10 PRIVATE RIGHT OF ACTION, I BELIEVE, IS BASED ON THE UCL, BUT
11 BECAUSE --

12 **MR. DUUS:** WHICH DOES NOT APPLY TO THE DISTRICT.

13 **THE COURT:** -- AS I BELIEVE THE PLAINTIFF WILL
14 CONCEDE, THE DISTRICT CAN'T BE SUBJECT TO LIABILITY UNDER THE
15 UCL, I THINK THAT IN THE END IT COMES OUT THE SAME WAY, THAT
16 THERE CAN'T BE A PRIVATE RIGHT OF ACTION. BUT I WILL GIVE
17 MS. AMEY AN OPPORTUNITY TO ADDRESS THAT ISSUE. BUT, YES, I DID
18 NOTE THAT AS WELL. ALL RIGHT. THANK YOU.

19 SO LET ME JUST START WITH AN OBSERVATION, WHICH IS I
20 FOUND THE OPPOSITION NOT VERY HELPFUL. IT WAS EXTREMELY
21 CURSORY, COMPLETELY LAW FREE, AND SO I'M COMING TO THIS HEARING
22 WITHOUT BENEFIT OF THE WRITTEN VIEWS THAT THE PLAINTIFF MIGHT
23 HAVE.

24 BEFORE I GET THERE, THOUGH, I DID SEE THAT THERE WAS
25 A GUARDIAN AD LITEM MOTION THAT WAS FILED. I THINK I NEED TO

1 DECIDE THAT BEFORE WE CAN PROCEED TO RESOLUTION ON THIS MOTION
2 OR ANY OTHER PENDING MOTION. DO YOU AGREE?

3 **MS. AMEY:** YES, YOUR HONOR.

4 **THE COURT:** OKAY. I'M NOT SURE THAT MOTION IS
5 SUFFICIENT. IT'S ALSO VERY THIN. BUT I'M GOING TO TAKE A LOOK
6 AT THAT. THERE'S JUST NOT -- I'M NOT SURE THAT YOU'VE SHARED
7 WITH ME ALL THE THINGS YOU NEED TO SHARE WITH ME IN SUPPORT OF
8 WHAT I NEED TO EVALUATE. BUT I WILL TAKE A LOOK AT IT. I'M
9 GOING TO GO AHEAD AND HEAR ARGUMENT BECAUSE YOU BOTH ARE HERE,
10 AND IT DID NOT OCCUR TO ME THIS WAS A PROBLEM UNTIL, FRANKLY,
11 YESTERDAY WHEN I WAS REVIEWING SOME OF THE MATERIALS, THAT WE
12 HAD SKIPPED THIS STEP OF APPOINTING A GUARDIAN AD LITEM.

13 SO I WOULD LIKE TO HEAR FROM YOU. LET'S START WITH
14 THE QUESTION OF THE SOPIPA ISSUE. I ASSUME, MS. AMEY, YOU'VE
15 SEEN THE SAME ARGUMENTS THAT ARE IN GOOGLE'S MOTION, WHICH,
16 AGAIN, IS NOT EXPRESSLY BEFORE ME HERE, BUT HAS BEEN RAISED NOW
17 BY THE DEFENSE, THE PREEMPTION ARGUMENT, AND ALSO THE UCL
18 ARGUMENT, MEANING THE ONLY WAY THAT SOPIPA CREATES A PRIVATE
19 RIGHT OF ACTION, OR SUPPORTS A PRIVATE RIGHT OF ACTION, IS VIA
20 THE UCL, AND THE SCHOOL DISTRICT IS NOT -- IS NOT LIABLE --
21 CANNOT BE LIABLE UNDER THE UCL THEORY. SO IT SEEMS TO ME CLAIM
22 2, NO MATTER HOW YOU SLICE IT, IS OUT OF THE CASE.

23 **MS. AMEY:** I DON'T THINK SO, YOUR HONOR. I BELIEVE
24 THAT THE CALIFORNIA CONSUMER PRIVACY ACT WOULD GIVE US A
25 PRIVATE RIGHT OF ACTION, AS IT CAN BE BROUGHT WHEN A PERSON HAS

1 ALLEGED A SECURITY BREACH.

2 **THE COURT:** OKAY. BUT THAT'S AN ARGUMENT THAT YOU
3 MAKE IN SUPPORT OF CLAIM 4, WHICH IS YOUR NEGLIGENCE, FAILURE
4 TO PROTECT CLAIM. I'M TALKING ABOUT CLAIM 2, WHICH IS BASED ON
5 SOPIPA. AND THE ARGUMENT IS, ONE, THERE'S NO PRIVATE RIGHT OF
6 ACTION THAT COULD BE BROUGHT -- THAT COULD SUPPORT A CLAIM
7 AGAINST THE SCHOOL DISTRICT. THAT'S ONE ARGUMENT. THE OTHER
8 ARGUMENT IS, REGARDLESS, SOPIPA IS PREEMPTED BY COPPA.

9 **MS. AMEY:** I DON'T THINK SOPIPA IS PREEMPTED, AND
10 THAT IS BECAUSE OUR ISSUE IN THE COMPLAINT, YES, WE ARE -- HAVE
11 ALLEGED THAT THE DEFENDANTS COLLECTED THE PRIVATE AND PERSONAL
12 INFORMATION OF THE CHILD. BUT WE'VE ALSO ALLEGED THAT THEY
13 HAVE COLLECTED COMMUNICATIONS BETWEEN THE CHILD, HIS PEERS, AND
14 THE STAFF, WHICH IS NOT SOMETHING THAT IS COVERED UNDER COPPA.
15 IT'S NOT REGULATED BY COPPA WHEN YOU'RE COLLECTING THE BACK AND
16 FORTH COMMUNICATIONS.

17 **THE COURT:** OKAY. I AM A LITTLE BIT CONFUSED BY YOUR
18 ARGUMENT AND HOW IT CONNECTS TO THIS CLAIM 2, BECAUSE CLAIM 2
19 IS SPECIFICALLY UNDER SOPIPA, AND I DON'T SEE HOW IT RELATES TO
20 COMMUNICATION.

21 LET ME JUST PAUSE AND SAY, MS. AMEY, I APPRECIATE YOU
22 HAVE NOT HAD AN OPPORTUNITY TO BRIEF IN ISSUE AT ALL, AND IT
23 MAY BE UNFAIR FOR ME TO ASK YOU THESE QUESTIONS. I'M HAPPY TO
24 GIVE YOU THE OPPORTUNITY TO BRIEF THE PREEMPTION QUESTION AND
25 THE ARGUMENT ABOUT THE UCL BEING THE ONLY VEHICLE FOR PRIVATE

1 RIGHT OF ACTION UNDER SOPIPA AGAINST THE SCHOOL DISTRICT AND
2 THE UNAVAILABILITY OF THAT CLAIM.

3 BOTH OF THOSE ISSUES WERE NOT RAISED IN THE BRIEFING
4 ON THIS MOTION, AND IF YOU NEED AN OPPORTUNITY TO DO THAT
5 BEFORE I ADDRESS IT, I'M HAPPY TO GIVE THAT TO YOU, BECAUSE
6 THAT'S ONLY FAIR. SO IF YOU'RE NOT PREPARED TO ADDRESS THOSE
7 ARGUMENTS TODAY, I WANT TO TELL YOU YOU CAN LET ME KNOW THAT.

8 **MS. AMEY:** RIGHT. SO I AM NOT PREPARED TO ADDRESS
9 PREEMPTION REGARDING THE SCHOOL DISTRICT --

10 **THE COURT:** OKAY.

11 **MS. AMEY:** -- REGARDING THE COPPA ISSUE. BECAUSE I
12 HAVE BEEN WORKING ON THE ISSUE FOR GOOGLE --

13 **THE COURT:** OKAY.

14 **MS. AMEY:** -- I HAVEN'T BEEN WORKING ON IT FOR --

15 **THE COURT:** WELL, WOULD YOU LIKE AN OPPORTUNITY TO
16 SUBMIT A SUPPLEMENTAL BRIEF ON THIS ISSUE FOR PURPOSES OF THE
17 DISTRICT'S MOTION TO DISMISS?

18 **MS. AMEY:** YES, YOUR HONOR.

19 **THE COURT:** OKAY. DO YOU WANT TO DO THAT AT THE SAME
20 TIME YOU RESPOND TO GOOGLE'S MOTION?

21 **MS. AMEY:** YEAH, THAT WOULD WORK. I RESPOND TO
22 GOOGLE ON THURSDAY, SO, YES.

23 **THE COURT:** THIS THURSDAY?

24 **MS. AMEY:** MM-HMM.

25 **THE COURT:** ANY OBJECTION TO THAT ON BEHALF OF THE

1 DISTRICT?

2 **MR. DUUS:** NO, YOUR HONOR. COULD WE SUBMIT A REPLY
3 BRIEF TO THAT?

4 **THE COURT:** I MEAN, I'M HAPPY TO BE FULLY INFORMED ON
5 THE ISSUE SINCE IT IS RAISED. SO I WOULD BENEFIT FROM THAT.
6 ANY OBJECTION FROM THE PLAINTIFF, MS. AMEY?

7 **MS. AMEY:** ABOUT THE REPLY BRIEF?

8 **THE COURT:** YEAH.

9 **MS. AMEY:** YES.

10 **THE COURT:** WHAT'S YOUR BASIS FOR AN OBJECTION?

11 **MS. AMEY:** I FEEL LIKE IF THEY'RE GOING TO DO A REPLY
12 BRIEF, THEY SHOULD BRIEF THE ISSUES AND I REPLY TO THAT.

13 **THE COURT:** SO YOU WOULD PREFER THEM TO GO FIRST,
14 WRITE A WRITTEN MOTION ON THE PREEMPTION AND UCL ISSUES, AND
15 THEN GIVE YOU AN OPPORTUNITY TO OPPOSE AND THEN HAVE A REPLY?
16 THAT'S WHAT YOU WOULD PREFER? SO MORE BRIEFING?

17 ALL RIGHT. I WILL GIVE THE PARTIES A BRIEFING
18 SCHEDULE. DOES THE DISTRICT OBJECT TO MORE BRIEFING RATHER
19 THAN LESS ON THIS ISSUE?

20 **MR. DUUS:** NO, YOUR HONOR.

21 **THE COURT:** I DON'T THINK IT'S NECESSARY, BUT, YOU
22 KNOW, I'M HAPPY TO GIVE YOU THE BENEFIT OF HAVING THE DISTRICT
23 LAY ITS ARGUMENTS OUT SO YOU CAN OPPOSE THEM.

24 (SIMULTANEOUS COLLOQUY.)

25 **MR. DUUS:** YOUR HONOR, IF THE COURT DOESN'T THINK

1 IT'S NECESSARY, I'M HAPPY TO JUST WITHDRAW THE REQUEST FOR A
2 REPLY BRIEF, JUST TO GO AHEAD WITH THE BRIEFING AT THIS STAGE.

3 **THE COURT:** ALL RIGHT. HOW ABOUT THAT?

4 **MS. AMEY:** THAT'S FINE.

5 **THE COURT:** JUST AN OPPOSITION TO THE ARGUMENTS THAT
6 HAVE BEEN RAISED.

7 **MS. AMEY:** YES.

8 **THE COURT:** THAT'S SIMPLER. I APPRECIATE THAT
9 ACCOMMODATION. THANK YOU. THAT WILL DUE BY THURSDAY.

10 **MS. AMEY:** THAT WOULD BE ON ISSUE 2 AND 4?

11 **THE COURT:** WELL, IT'S CLAIM 2 -- THE PREEMPTION
12 ISSUE -- WELL, THE PREEMPTION ISSUE IS BROADER THAN CLAIM 2,
13 HONESTLY. SO YOU CAN -- YOU CAN ASSUME, AS I UNDERSTAND THE
14 DISTRICT, THAT THE PREEMPTION ISSUE APPLIES TO ALL OF THE
15 REMAINING CLAIMS; IS THAT NOT CORRECT?

16 **MR. DUUS:** CORRECT, YOUR HONOR.

17 **THE COURT:** OKAY. SO THAT'S THE CONTENTION THE
18 DISTRICT IS MAKING NOW. THE UCL ISSUE, I BELIEVE, RELATES ONLY
19 TO CLAIM 2 BECAUSE THAT'S SPECIFIC TO SOPIPA, SO IT'S AN
20 ALTERNATIVE ARGUMENT THAT IS ADDRESSED ONLY TO CLAIM 2.

21 OKAY. SO IF YOU COULD ADDRESS BOTH OF THOSE IN YOUR
22 SUPPLEMENTAL BRIEF DUE THURSDAY, I WOULD VERY MUCH APPRECIATE
23 THAT.

24 **MS. AMEY:** THANK YOU.

25 **THE COURT:** OKAY.

1 **MR. DUUS:** YOUR HONOR, I THOUGHT THAT PLAINTIFF HAD
2 CONCEDED THE UCL --

3 **THE COURT:** YES, YOU ARE QUITE CORRECT, BUT THAT WAS
4 IN THE CONTEXT OF THE ARGUMENT BASED ON ONE OF THE -- EXPRESSLY
5 BASED ON CLAIM 3, SO I JUST -- I THINK YOU'RE RIGHT. I WOULD
6 LIKE TO GIVE MS. AMEY AN OPPORTUNITY TO ADDRESS THAT POINT TO
7 SEE IF THERE'S ANY BASIS FOR DISAGREEMENT SINCE THAT WAS A
8 SURPRISE TO HER. OKAY.

9 MS. AMEY, IT WOULD BE HELPFUL TO ME, IN UNDERSTANDING
10 YOUR CLIENT'S POSITION ON CLAIM 2, IF YOU COULD ARTICULATE MORE
11 PRECISELY WHAT IT IS -- WHAT IS THE ONLINE SERVICE, OR WEBSITE,
12 OR APPLICATION THAT YOUR COMPLAINT PUTS AT ISSUE FOR CLAIM 2,
13 BECAUSE, YOU KNOW, I THINK THAT THE DISTRICT IS QUITE RIGHT,
14 THAT THE ALLEGATIONS AS FRAMED IN THE COMPLAINT ARE SPECIFIC TO
15 GOOGLE AND GOOGLE'S APPLICATION.

16 SO I'M HAVING TROUBLE UNDERSTANDING YOUR ARGUMENT
17 THAT THE DISTRICT IS AN OPERATOR OF THE ONLINE APPLICATION
18 GOOGLE CLASSROOM AND THAT GOOGLE IS AN OPERATOR OF SOME OTHER
19 ONLINE SERVICE AND PORTION OF THE APPLICATION. THAT IS NOT
20 DESCRIBED IN YOUR COMPLAINT, AND IT'S NOT CLEAR IN YOUR VERY,
21 VERY ABBREVIATED PAPERS IN OPPOSITION. SO WHAT DO YOU MEAN?

22 **MS. AMEY:** WELL, THE GOOGLE PLATFORM IS BUILT BY
23 GOOGLE. ONCE IT ENTERS INTO THE CLASSROOM, THE TEACHERS AND
24 THE STAFF HAVE THE ABILITY TO CONTROL IT. SO IF THE STUDENT IS
25 LOOKING AT SOMETHING, THEY'RE LOOKING AT (INDISCERNIBLE) PAGE,

1 THE TEACHER HAS AN ABILITY TO CLOSE THAT OUT. THE TEACHERS
2 HAVE THE ABILITY TO SEE WHAT THE CHILDREN ARE TYPING, SEE
3 THEY'RE ON TASK.

4 **THE COURT:** BUT ANY USER OF THE APPLICATION WOULD
5 HAVE THAT SAME ABILITY. SO YOU COULD TALK ABOUT ANY
6 APPLICATION THAT'S MADE AVAILABLE, EITHER ONLINE OR IN SOME
7 OTHER FASHION, AND THE USER HAS THE OPPORTUNITY OR ABILITY TO
8 MANIPULATE THE APPLICATION TO USE ITS FUNCTIONS, ITS FEATURES,
9 ALL OF IT.

10 SO HOW IS THE -- IN THIS CONTEXT, HOW IS THE SCHOOL
11 DISTRICT DISTINCT FROM JUST THE EXPECTED USER OF THE
12 APPLICATION, AND WHAT MAKES IT AN OPERATOR OF THE APPLICATION
13 UNDER THE STATUTE?

14 **MS. AMEY:** SO THE CHILD IS USING THE APPLICATION, BUT
15 THE TEACHER IS CONTROLLING --

16 **THE COURT:** ALSO USING THE APPLICATION.

17 **MS. AMEY:** THE TEACHER AND STUDENT IS ALSO USING THE
18 APPLICATION, AND THE TEACHER IS CONTROLLING WHAT THE CHILD IS
19 USING. SO THE TEACHER IS ABLE TO CONTROL WHAT THE CHILD IS
20 DOING, WHICH MAKES THEM THE OPERATOR OF IT.

21 **THE COURT:** HOW DOES THAT MAKE THEM THE OPERATOR
22 UNDER THE STATUTE?

23 **MS. AMEY:** BECAUSE THE OPERATOR IS THE PERSON
24 OPERATING THE SYSTEM, AND THAT WOULD BE THE TEACHER.

25 **THE COURT:** WHERE DO YOU GET THAT FROM THE STATUTE?

1 **MS. AMEY:** JUST THAT IT IDENTIFIES AS THE OPERATOR.

2 **THE COURT:** OKAY. I HAD THIS WHOLE COLLOQUY WITH THE
3 DISTRICT ABOUT THE STATUTORY DEFINITION. IT WAS VERY
4 UNHELPFUL. SO DO YOU HAVE ANYTHING MORE TO HELP SO --

5 (SIMULTANEOUS COLLOQUY.)

6 **MS. AMEY:** SO FOR ME, I ASKED THE PEOPLE WHO
7 DEVELOPED THE SITE -- WELL, NOT THE ACTUAL SITE, BUT WHO
8 DEVELOP THESE TYPES OF SITES, AND I ASKED THEM, LIKE, IS THIS
9 AN OPERATOR? THEY SAID WE CONSIDER THAT TO BE AN OPERATOR,
10 BECAUSE IF THE TEACHERS CAN DO THESE FUNCTIONS, TURN IT OFF
11 TURN IT ON, TURN THINGS OFF.

12 **THE COURT:** SO YOU'RE JUST ASKING RANDOM PEOPLE IN
13 THE WORLD WHO ARE NOT -- THERE'S NO ALLEGATION IN THE
14 COMPLAINT. THERE'S NO DECLARATION. THERE'S NO ANYTHING. SO
15 YOU'RE JUST TELLING ME THIS IS LIKE THE PROCESS YOU WENT TO --

16 **MS. AMEY:** YOU KNOW, THE STATUTE DOESN'T GIVE A LOT
17 OF DEFINITION FOR AN OPERATOR, SO THE ONLY -- IN ORDER TO
18 IDENTIFY WHO THE OPERATOR WAS, I HAD TO ASK THE PEOPLE WHO
19 DEVELOPED THAT SITE, DOES THIS IDENTIFY AS AN OPERATOR.

20 **THE COURT:** OKAY. LET ME ASK YOU ABOUT CLAIM 4. I
21 REALLY DON'T UNDERSTAND THIS CLAIM AS IT'S EXPLAINED IN YOUR
22 OPPOSITION AND AS PLED IN THE COMPLAINT. THE DISCUSSION IS WAY
23 TOO ABBREVIATED. IT'S NOT RESPONSIVE TO THE DISTRICT'S MOTION.

24 THE MOST I CAN GLEAN IS THAT THE DISTRICT GAVE
25 CONSENT TO SOMETHING AND TO GOOGLE, MAYBE, OR ACCESS TO THE

1 EDUCATION ENVIRONMENT, WHICH UTILIZES DATA FOR COMMERCIAL
2 PURPOSE. THERE'S NO STATUTE THAT'S CITED THAT CREATES A DUTY.
3 ARE YOU EVEN RELYING ON A DUTY THAT THE DISTRICT OWED TO M.K.?
4 WHAT IS THE DUTY? WHERE IS IT SOURCED? I CAN'T DISCERN ANY OF
5 THAT FROM THE COMPLAINT OR YOUR OPPOSITION, FRANKLY.

6 **MS. AMEY:** WELL, THE LAW OF COPPA GIVES THE DISTRICT
7 (INDISCERNIBLE) ENTITIES A DUTY TO DO CERTAIN THINGS TO PROTECT
8 PRIVACY OF THE CHILD.

9 **THE COURT:** SO IF YOU'RE RELYING ON COPPA AS THE
10 SOURCE OF THE DUTY, WHY DOESN'T COPPA COMPLETELY PREEMPT?

11 **MS. AMEY:** BECAUSE IT'S NOT -- COPPA GIVES THEM THE
12 RESPONSIBILITY, BUT COPPA IS NOT -- COPPA (INDISCERNIBLE) GIVES
13 THEM RESPONSIBILITY, BUT BECAUSE IT MIGHT -- AND MY ARGUMENT IS
14 THAT THE COLLECTION OF COMMUNICATIONS AND COLLECTION OF THE
15 BIOMETRIC DATA IS NOT REGULATED BY COPPA --

16 **THE COURT:** WHAT BIOMETRIC DATA?

17 **MS. AMEY:** THE BIOMETRIC DATA --

18 **THE COURT:** WHAT BIOMETRIC DATA IS BEING COLLECTED BY
19 THE SCHOOL DISTRICT? I DON'T FIND THAT ANYWHERE. IT'S LIKE,
20 THERE'S A STATEMENT THAT IT IS COLLECTED BY GOOGLE AND OTHERS.
21 AND WHAT ARE YOU TALKING ABOUT.

22 **MS. AMEY:** SO IN THIS CASE, HOW LONG IT TAKES A
23 STUDENT TO ANSWER THE QUESTION.

24 **THE COURT:** THAT'S BIOMETRIC DATA.

25 **MS. AMEY:** YES.

1 **THE COURT:** IF COPPA CREATES THE DUTY WITH RESPECT TO
2 THAT OR COMMUNICATIONS, THEN I DON'T UNDERSTAND WHY COPPA
3 DOESN'T COMPLETELY PREEMPT, BUT MAYBE YOU WILL TELL ME THE
4 ANSWER TO THAT QUESTION.

5 IF COPPA DOESN'T CREATE THE DUTY BECAUSE IT DOESN'T
6 ADDRESS THINGS LIKE COMMUNICATIONS, WHICH IS WHAT I THOUGHT YOU
7 TOLD ME EARLIER, THEN I DON'T SEE WHAT THE SOURCE IS OF THE
8 SCHOOL DISTRICT'S ALLEGED DUTY THAT WAS THEN BREACHED.

9 **MS. AMEY:** I UNDERSTAND THAT.

10 SO IT IS OUR ARGUMENT THAT COPPA DOESN'T REGULATE THE
11 BIOMETRIC DATA OR THOSE COMMUNICATIONS, CORRECT. BUT ALSO
12 (INDISCERNIBLE) BOTH ARGUMENTS GOOGLE (INDISCERNIBLE) BUT THE
13 FAILURE TO PROTECT, I BELIEVE, CAN EXIST EVEN THOUGH COPPA
14 PREEMPTS THAT CLAIM UNDER COPPA. BECAUSE THIS IS NOT A COPPA,
15 CLAIM, THE FAILURE TO PROTECT, IS ITS OWN INDIVIDUAL CLAIM, BUT
16 COPPA TELLS THE DISTRICT OR THE ENTITIES THEY HAVE TO PROTECT
17 THE CHILD.

18 **THE COURT:** ALL RIGHT. HOW DO YOU -- HOW DO YOU DEAL
19 WITH THE CALIFORNIA GOVERNMENT CODE PROVISIONS THAT REQUIRE
20 THAT IF YOU'RE GOING TO BRING A TORT CLAIM, YOU HAVE TO HAVE
21 SOME STATUTORY BASIS, OR YOU HAVE TO FIT IN, AT LEAST, WITH THE
22 PROVISION AND THE EXCEPTIONS TO THOSE IN GOVERNMENT CALIFORNIA
23 CODE 815 AND THE SECTIONS THAT FOLLOW?

24 **MS. AMEY:** I AGREE WITH THAT. AND I WOULD ALSO ASK
25 FOR LEAVE TO AMEND TO ADD AN ADA, AMERICANS WITH DISABILITIES

1 ACT --

2 **THE COURT:** I'M GOING TO GET TO THAT IN A MOMENT
3 BECAUSE I SAW THAT ONE LINE IN YOUR OPPOSITION. BUT IT SEEMS
4 TO ME LIKE THAT IS COMPLETELY -- THAT WOULD BE A TOTALLY
5 DIFFERENT CLAIM.

6 SO TALKING ABOUT THE NEGLIGENCE/FAILURE TO PROTECT
7 CLAIM THAT YOU ACTUALLY HAVE PLED AS CLAIM 4, I DON'T SEE HOW
8 YOU AVOID THE PROHIBITIONS ON SUING A PUBLIC ENTITY WITHOUT
9 IDENTIFYING STATUTORY SOURCE OF SOME DUTY THAT WAS BREACHED.

10 **MS. AMEY:** BUT I BELIEVE THE CALIFORNIA PRIVACY ACT
11 GIVES US AN INDEPENDENT SOURCE.

12 **THE COURT:** BUT YOU HAVEN'T PLED SUCH A CLAIM.
13 HERE'S THE PROBLEM: IF THERE IS A VIOLATION OF A STATUTE THAT
14 THE PUBLIC ENTITY IS SUBJECTED TO -- IS BOUND BY, THEN PLEAD A
15 CLAIM.

16 BUT IF THE PUBLIC ENTITY IS IMMUNE FROM LIABILITY OR
17 IT'S NOT WITHIN THE SCOPE OF THAT PARTICULAR STATUTE, THEN I
18 DON'T SEE HOW YOU COULD JUST CALL IT SOMETHING ELSE AND SAY
19 THAT IT HAS -- THE DISTRICT HAS AN OBLIGATION THAT ARISES FROM
20 THAT STATUTE THAT DOESN'T APPLY TO THEM.

21 SO DO YOU SEE WHAT I'M SAYING? YOU CAN'T JUST SAY,
22 HERE'S THE STATUTE OVER HERE, AND THAT MEANS I CAN PLEAD A
23 NEGLIGENCE CLAIM. THAT DOESN'T WORK.

24 **MS. AMEY:** OKAY. AND MY COMPLAINT DOES HAVE A
25 CALIFORNIA CIVIL PRIVACY RIGHT, THERE'S NO CLAIM OF IT

1 (INDISCERNIBLE) COMPLAINT.

2 **THE COURT:** IT'S NOT A CLAIM, RIGHT, SO IT'S CITED AS
3 A SOURCE OF SOME DUTY THAT IS NOT ELABORATED UPON.

4 OKAY. SO LET ME -- AND THE FACT THAT THAT ALLEGATION
5 COMES UP IN CLAIM 5, WHICH HAS TO DO WITH THE CALIFORNIA
6 CONSTITUTIONAL RIGHT OF PRIVACY, THAT CLAIM, THE ALLEGATIONS IN
7 THAT CLAIM REFER EXCLUSIVELY TO GOOGLE'S CONDUCT, NOT THE
8 DISTRICT'S CONDUCT.

9 SO THERE'S A MISMATCH AGAIN BETWEEN WHAT YOU SAY IN
10 YOUR OPPOSITION AND WHAT YOU SAY HERE AND THE ACTUAL
11 ALLEGATIONS OF THE COMPLAINT, WHICH I FIND SOMEWHAT
12 PROBLEMATIC. BUT LET ME TURN TO THE MATTER YOU RAISED JUST A
13 MOMENT AGO, WHICH IS A ONE-LINE REQUEST TO ADD AN ADA CLAIM.

14 THERE IS NO SUPPORT ANYWHERE IN YOUR PAPERS FOR
15 AMENDMENT TO ADD AN ADA CLAIM. ALL I'M GOING TO SAY ABOUT THAT
16 IS THAT THE PLAINTIFF NEEDS TO COMPLY WITH THE FEDERAL RULES OF
17 CIVIL PROCEDURE IF YOU WISH TO AMEND YOUR COMPLAINT TO ADD NEW
18 ALLEGATIONS OR NEW CLAIMS.

19 SO I'M DEALING WITH THE CLAIMS THAT ARE PRESENT HERE,
20 AND JUST A ONE-LINE REQUEST THAT SAYS, LET ME ADD AN ADA CLAIM,
21 IS NOT COMPLIANT. SO I DON'T FEEL LIKE IT'S APPROPRIATE FOR ME
22 TO ADDRESS IT. I'M GOING TO TELL YOU HOW TO DO IT OR WHETHER
23 IT CAN BE DONE, BUT YOU NEED TO COMPLY WITH THE FEDERAL RULES
24 IF YOU WANT TO AMEND YOUR COMPLAINT.

25 **MS. AMEY:** YOUR HONOR, THE FIFTH ISSUE, I DO BELIEVE

1 I (INDISCERNIBLE) DISTRICT IN THERE.

2 **THE COURT:** OKAY. POINT ME TO THE ALLEGATIONS YOU
3 ARE REFERRING TO.

4 **MS. AMEY:** PARAGRAPH (INDISCERNIBLE).

5 **THE COURT:** YES. YOU PUT THEM TOGETHER IN THE SAME
6 SENTENCE, BUT THE CONDUCT THAT'S ACTUALLY -- THE FACTUAL
7 ALLEGATIONS THAT ARE ALLEGED OR THAT ARE PLEADED TO SUPPORT
8 THIS CLAIM ALL HAVE TO DO WITH GOOGLE SPECIFICALLY. SO IT'S
9 GOOGLE'S CONDUCT THAT IS ELABORATED ON IN THE PARAGRAPHS THAT
10 FOLLOW FROM PARAGRAPH 88.

11 SO THAT'S THE DIFFICULTY I HAVE, IS WHEN I LOOK FOR
12 THE FACTUAL ALLEGATION TO SUPPORT CLAIMS FOR VIOLATION OF THE
13 RIGHT TO PRIVACY, IT'S ALL ABOUT WHAT GOOGLE DOES OR DOESN'T
14 DO. YES, THERE ARE PLACES WHERE YOU LUMP THEM TOGETHER AND YOU
15 USE THE WORD "DEFENDANTS," BUT I'M LOOKING FOR ALLEGATIONS THAT
16 MAKE THE CLAIM PLAUSIBLE, AND THAT'S WHAT I THINK IS MISSING
17 FROM CLAIM 5. AND I DON'T FIND MUCH HELP IN YOUR OPPOSITION IN
18 SORTING THAT OUT.

19 IS THERE ANYTHING MORE YOU'D LIKE TO ARGUE ON THAT
20 POINT?

21 **MS. AMEY:** NO, YOUR HONOR.

22 I WILL SAY ABOUT THE ADA CLAIM, I DID NOT HAVE
23 (INDISCERNIBLE) MAKE A MOTION. AT THE TIME OF THE COMPLAINT
24 THE STUDENT HAD NOT BEEN FOUND -- IDENTIFIED YET AS A PERSON
25 WITH A DISABILITY.

1 **THE COURT:** AGAIN, I DON'T WANT TO PREJUDGE ANY
2 AMENDMENT, BUT I JUST -- LET ME JUST PUT OUT THERE THE FACT
3 THAT A PLAINTIFF MAY HAVE A DISABILITY DOESN'T NECESSARILY MEAN
4 THAT THERE'S BEEN THAT -- THAT THE CONDUCT THAT YOU HAVE
5 CURRENTLY IN YOUR COMPLAINT MEANS THERE'S AN ADA VIOLATION. DO
6 YOU SEE WHAT I MEAN?

7 (SIMULTANEOUS COLLOQUY.)

8 **THE COURT:** OKAY. I JUST DON'T WANT US TO GET OFF ON
9 A WRONG TRACK HERE. I WILL WAIT AND SEE WHATEVER IT IS YOU
10 WANT TO PROPOSE BY WAY OF AMENDMENT IF YOU -- AGAIN, IN
11 COMPLIANCE WITH THE FEDERAL RULES. AND AT THIS TIME I DON'T
12 THINK THERE IS -- THAT IT'S WARRANTIED FOR ME TO ADDRESS THAT
13 ISSUE.

14 OKAY. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ARGUE
15 TO THE COURT IN THESE PROCEEDINGS?

16 **MS. AMEY:** NO.

17 **THE COURT:** OKAY. ANYTHING FURTHER FROM THE
18 DISTRICT?

19 **MR. DUUS:** YOUR HONOR, I WOULD LIKE TO EMPHASIZE ONE
20 THING --

21 **THE COURT:** SURE.

22 **MR. DUUS:** -- THAT MS. AMEY JUST SAID ON THE RECORD.

23 WHEN YOU WERE ASKING HER ABOUT THE BASIS FOR THE
24 CLAIM 4, SHE SAID -- I DON'T WANT TO MISQUOTE HER, BUT THIS IS
25 WHAT I HEARD, SOMETHING TO THE EFFECT THAT COPPA REQUIRES THE

1 DISTRICT TO PROTECT THE STUDENTS. SO THAT, TO ME, IS AN
2 ADMISSION THAT THE BASIS FOR THIS CLAIM IS A VIOLATION OF
3 COPPA, NOT THE ADA OR SOME OTHER STATUTE. SO IF THE COPPA
4 PREEMPTION AND THE OTHER ARGUMENTS ARE APPLICABLE, THIS CLAIM
5 SHOULD NOT PROCEED.

6 **MS. AMEY:** I THINK I SAID THAT ALTHOUGH COPPA DOES
7 NOT FORM THE BASIS OF THIS. IT GOES GIVE THE
8 DISTRICT (INDISCERNIBLE) SO I WOULD ACKNOWLEDGE THAT.

9 **THE COURT:** RIGHT. AND WE HAVE COLLOQUY ON HOW THAT
10 DOESN'T MAKE A LOT OF SENSE TO ME.

11 AGAIN, I APPRECIATE YOU'VE ASKED FOR -- OR I INVITED
12 YOU TO BRIEF THE ISSUE OF PREEMPTION. I WILL LET YOU DO THAT,
13 AND I WILL WAIT TO SEE WHAT YOU SAY. AND VERY LIKELY I WILL
14 NOT BE DECIDING THIS MOTION UNTIL AFTER THE GOOGLE MOTION TO
15 DISMISS IS FULLY BRIEFED SO I HAVE THE BENEFIT OF COMPREHENSIVE
16 UNDERSTANDING OF ALL THE PARTIES' POSITION ON THIS POINT.

17 BUT I WILL ISSUE A WRITTEN DECISION AFTER I GET ALL
18 THE BRIEFING. I'M UNLIKELY TO ENTERTAIN FURTHER ARGUMENT ON
19 THIS PARTICULAR MOTION.

20 SO THANK YOU, BOTH, FOR THE BENEFIT OF YOUR
21 ARGUMENTS.

22 **MS. AMEY:** THANK YOU, YOUR HONOR.

23 **MR. DUUS:** THANK YOU, YOUR HONOR.

24 **THE COURT:** THIS MATTER IS CONCLUDED.

25 (PROCEEDINGS ADJOURNED AT 11:18 A.M.)

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
ACTION.

incolombia

JOAN MARIE COLUMBINI

JULY 19, 2022